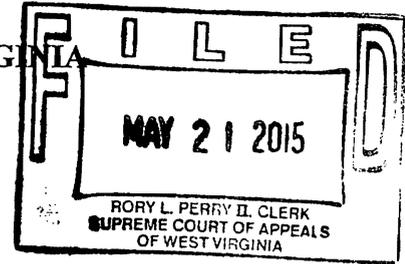


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No.: 14-1332



WHEELING PARK COMMISSION,

Petitioner,

v.

JOSEPH DATTOLI and  
KERRY DATTOLI, his wife,

Respondents.

Appeal from the final Order of the  
Circuit Court of Ohio County  
CASE No.: 09-C-274

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**RESPONDENTS' BRIEF**

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**STATEMENT OF THE CASE**

This case arises from an incident on September 1, 2007, at Oglebay Park Resort and Conference Center. The Plaintiffs were attending a family reunion at the park and there was also an event known as Fort Henry Days going on at the same time. During Fort Henry Days there are

several activities and attractions throughout the park that are not there normally. More specifically, there were a number of amusement/carnival rides and attractions in the parking lot that sits above the Schenk Lake boathouse. It was these attractions that drew Plaintiff Joseph Dattoli and his family members to area above the boathouse. Plaintiff Joseph Dattoli's daughter wanted to attempt the rock climbing wall and Mr. Dattoli wanted to view her attempt. *Appendix: Bates 1040*. During a conversation with his family members, Plaintiff Joseph Dattoli was standing in a grassy area between the parking lot and the fence when he went to lean against a split rail fence to watch his daughter. *Id.* at 1041. As he leaned his butt against the second post and went to put his hand on the top rail, the end of the top rail broke into several pieces causing Plaintiff Dattoli to fall down a hill and injure his left shoulder. *Appendix: Bates 1041-1044*. There is absolutely no evidence or testimony that Plaintiff Dattoli ever sat or attempted to sit on the fence rail. *Id.* at 1043. There is also no evidence or testimony that Plaintiff Dattoli did anything out of the ordinary. *Id.* at 996. Prior to his fall, Plaintiff Dattoli glanced at the fence just to make sure that everything was there and still attached. *Id.* at 1044. The Defendant's own corporate designee, John Hargleroad, the Director of Operations for the Park since 1990, testimony provides more than enough information for a finding of liability against the Defendant. See appendix: Trial Transcript, Bates Stamp 1127. Mr. Hargleroad testified that the fence in question was not there in the 70's but was there in the 90's so it was installed at some point therein. *Id.* at 1129. Mr. Hargleroad also testified that the Park produced no records or documents in response to the Plaintiffs request asking for repair or maintenance records. *Id.* at 1147. Additionally, in testifying regarding Defense Exhibit 17 (several pieces of the broken subject fence), Mr. Hargleroad testified it was his understanding that it was the piece that

disengaged causing Plaintiff Joseph Dattoli to fall. *Id.* at 1160. Mr. Hargleroad further testified that he understood that wood has a life expectancy. *Id.* at 1161. Further, Mr. Hargleroad testified that the Park was in a better position to make sure the fence was in a state of good repair than a guest of the Park. *Id.* at 1163-1164.

As a result of the fall, Plaintiff Dattoli suffered a massive/full thickness rotator cuff tear that required surgical repair. *Id.* at 923, lines 6-9. Dr. Patrick DeMeo, an orthopaedic surgeon and medical director for the Pittsburgh Pirates, performed the surgery to repair the massive tear, and stated that the tear had gotten worse from the time of the injury to the surgery. *Id.* at 924, lines 19-24. Dr. DeMeo went on to testify that Plaintiff Dattoli's shoulder function would never be what it was before the injury and surgery, and that if Plaintiff Dattoli were a professional baseball player he would probably not be pitching again. *Id.* at 927 lines 15-17 and 928 lines 3-5. Following the surgery, Plaintiff Dattoli had to go through months of physical therapy. *Id.* at 1049-1051. In addition to the physical therapy, Plaintiff Dattoli also missed six months worth of work. *Id.* at 1051 lines 19-20.

Plaintiff Dattoli's wife, Kerry, testified first at trial. *Appendix: Bates 955-987.* She testified about the effects of the fall on Plaintiff Dattoli and their marriage. Mrs. Dattoli testified that she could tell her husband was in pain. *Id.* at 974 lines 8-17. She also testified that he was unable to sleep in their bed with her for months as he had to sleep in a recliner because of the pain and discomfort with his shoulder. *Id.* at 974 lines 18-24 and 975. Mrs. Dattoli went on to add that she had to help her husband bathe and that he was unable to help with any of the normal household duties he had in the past. *Id.* at 977, lines 11-21. Mrs. Dattoli also testified that there was stress added to their marriage because Plaintiff Dattoli was unable to work for six months.

*Id.* at 980, lines 3-13. During the time that Plaintiff Dattoli was off work they fell behind on bills and they received help from their church and family members. *Id.* at 986 lines 4-15. The Defense declined to cross examine Mrs. Dattoli. The Defense offered no witnesses in its case in chief. Although the jury found the Defendant one hundred percent at fault and awarded the Plaintiffs damages for medical bills and lost wages, the Plaintiffs should have been awarded additional sums for the other line items of damages including but not limited to past pain and suffering and loss of consortium. *Appendix: Verdict Form, Bates 758.* The Plaintiffs then filed a post-trial motion for new trial on damages that was granted by the Circuit Court.

### SUMMARY OF ARGUMENT

The Petitioner's first assignment of error is incorrect as the issue of liability was properly submitted to the jury and the jury found the Defendant to be one hundred percent (100%) at fault. The Plaintiffs introduced more than enough evidence through testimony of witnesses and exhibits that support the jury's finding of liability against the Defendant. The Defendant's one and only witness to testify, who was called to testify by the Plaintiffs in their case in chief, testified that he had no knowledge or documents of maintenance or repairs of the fence since its installation. There was no evidence that the Defendant did anything to ensure that the public grounds were in good repair for guests of the park. Additionally, Rachel Higgins, testified that Plaintiff Dattoli did nothing unusual or out of the ordinary when he attempted to lean against the fence. Ms. Higgins also testified that the fence broke almost instantly as Plaintiff Dattoli went to lean against it. Plaintiff Dattoli also testified that the top rail broke as soon he put his left arm

back. It does not require expert testimony for the jury to understand that the end of a fence rail should not break into little pieces. Given the extent of the testimony of the witnesses and the exhibits introduced the Circuit Court did not err in submitting the case to the jury.

Also, the Petitioner's attempt to classify this as a "Type 2" case under a *Freshwater* analysis is also incorrect. The fact that the jury assigned one hundred percent (100%) liability to the Defendant clearly shows that there was no confusion on the issue of liability. The Defendant spent a great deal of effort at trial and based the majority of their defense on showing the comparative negligence of the Plaintiff and despite those efforts, the jury found the Plaintiff to be zero percent (0%) negligent. If this case fits into any of the *Freshwater* type cases, it falls under a "Type 4" where liability was so conclusively proven that the jury had to be confused about damages. That the jury assigned all fault to the Defendant shows that the issue of liability was conclusively proven and it would be a windfall for the Defendant to have a new trial on all issues. The trial court correctly granted the Plaintiffs' motion for a new trial on damages only. There was uncontroverted testimony of Plaintiff Joseph Dattoli's pain and suffering and other damages. There was also uncontroverted testimony of the Plaintiff Kerry Dattoli's loss of consortium. The Defense offered no lay witnesses in its case in chief and offered not medical witness at all. For these reasons, the Circuit Court was correct in ordering a new trial on damages only.

Although Respondent believes that the Petitioner's third issue regarding the set-off of insurance benefits is not ripe for consideration is has been briefly addressed. The Respondent contends that the West Virginia statute, W.Va. Code § 29-12A-13(c), dealing with subrogation is pre-empted as it serves to negate or modify subrogation, reimbursement, or set-off of insurance

benefits that are already governed by federal law under ERISA. If the statute is not pre-empted, the Petitioner is not entitled to the set-off requested as the Petitioner is improperly attempting to reduce the damages awarded above and beyond the amount actually paid by Respondent Joseph Dattoli's health insurer, Carelink, and Petitioner is attempting to claim a set-off for wages received directly from Respondent Joseph Dattoli's employer. The Respondents maintain that the plain language of W.Va. Code § 29-12A-13(c) doesn't allow the relief requested by the Petitioner.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent believes the record in this matter clearly supports that the Circuit Court did not abuse its discretion in this case. However, the Respondent believes that oral argument under Rule 19 could be beneficial as the Petitioner has claimed that there was insufficient evidence, that the result was against the weight of the evidence and the Circuit Court abused its discretion.

#### **ARGUMENT**

**I: The issue of liability should have been submitted to the jury and the jury properly decided that the Petitioner was one hundred percent at fault.**

The Petitioner must overcome a heavy burden to overturn the jury's finding that the Petitioner was one hundred percent at fault. "We have traditionally held that in determining

whether the jury verdict is supported by the evidence ‘every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.’” *Orr v. Crowder*, 173 W. Va. 335, 347, 315 S.E.2d 593, 605 (W. Va. 1983) quoting Syllabus Point 3, in part, *Walker v. Monongahela Power Co.*, 147 W. Va. 825, 131 S.E.2d 736 (1963); See also Syllabus Point 3, *Royal Furniture Co. v. City of Morgantown*, 164 W. Va. 400, 263 S.E.2d 878 (1980); Syllabus Point 5, *First National Bank of Ronceverte v. Bell*, 158 W. Va. 827, 215 S.E.2d 642 (1975). “Furthermore, we have customarily held as stated in Syllabus Point 4, in part, of *Young v. Ross*, 157 W. Va. 548, 202 S.E.2d 622 (1974), that “it is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed.” *Orr v. Crowder*, 173 W. Va. 335, 347, 315 S.E.2d 593, 605-606 (W. Va. 1983); See also Syllabus Point 5, *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983); Syllabus Point 2, *Rhodes v. National Homes Corp.*, 163 W. Va. 669, 263 S.E.2d 84 (1979); Syllabus Point 2, *Skeen v. C and G Corp.*, 155 W. Va. 547, 185 S.E.2d 493 (1971); *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945).

“In West Virginia, the basic rule is that a verdict should not be directed against a plaintiff in a civil case unless he has failed to present a prima facie case.” *Blair v. Preece*, 346 S.E.2d 50, 51, 177 W. Va. 517 (W. Va. 1986); See *Jividen v. Legg*, 161 W. Va. 769, 245 S.E.2d 835 (1978). “In determining whether a prima facie case has been established, it is incumbent upon the trial judge to weigh the evidence in the plaintiff’s favor.” *Blair v. Preece*, 346 S.E.2d 50, 51, 177 W. Va. 517 (W. Va. 1986). “In determining whether there is sufficient evidence to support a jury

verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus Point 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (W. Va. 1983). In upholding a jury verdict for an injured coal miner against a mine owner, this Court held:

Upon careful review, this Court agrees with the observation of the circuit court that Stevenson's evidence with respect to negligence and proximate cause was marginal. Nevertheless, this Court agrees with the circuit court that the disputed facts regarding the issues of negligence and proximate cause presented a jury question. "It is not our job to weigh the evidence . . . or to disregard stories that seem hard to believe. Those tasks are for the jury." *Hoyle v. Freightliner*, 650 F.3d 321, 2011 U.S. App. LEXIS 6628, 2011 WL 1206658 (C.A. 4th Cir. - April 1, 2011). In this action, under the disputed facts a reasonable jury could have rationally found for the plaintiff.

*Stevenson v. Independence Coal Co.*, 227 W. Va. 368, 371, 709 S.E.2d 723, 726 (W. Va. 2011).

The Petitioner's argument that the Respondent did not identify any duty owed by the Petitioner is simply not true. The Petitioner, Wheeling Park Commission, is a political

subdivision. W.Va. Code § 29-12A-3(c). This Court has held that “[i]njuries occurring on public property are governed by specific statutes.” *Carrier v. City of Huntington*, 202 W. Va. 30, 33, 501 S.E.2d 466, 469 (W. Va. 1998). “The specific statutes are W.Va. Code § 29-12A-4(c)(3) . . . .” *Carrier v. City of Huntington*, 202 W. Va. 30, 33, 501 S.E.2d 466, 469 (W. Va. 1998). “With respect to W.Va. Code § 29-12A-4(c)(3), this Court held in syllabus point 3 of *Koffler v. City of Huntington*, 469 S.E.2d 645, 196 W. Va. 202 (1996), in part, that:

Under W.Va. Code, 29-12A-4(c)(3) [1986], political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance[.]”

*Carrier v. City of Huntington*, 202 W. Va. 30, 33, 501 S.E.2d 466, 469 (W. Va. 1998).

Also, premise liability principles are inapplicable to W.Va. Code § 29-12A-4(c)(3) as “. . . the statutes do not expressly provide for the distinctions contained in premises liability principles.” *Carrier v. City of Huntington*, 202 W. Va. 30, 33-34, 501 S.E.2d 466, 469-470 (W. Va. 1998). The Respondents’ cause of action against the Petitioner was statutorily created, and the statutes set forth the duties owed by the Petitioner to the Respondents. *Carrier v. City of Huntington*, 202 W. Va. 30, 33-34, 501 S.E.2d 466, 469-470 (W. Va. 1998). The Respondents asserted that the Petitioner violated W.Va. Code §§ 29-12A-4(c)(2) - (4). See Plaintiff’s Jury

Instructions at Appx. 459. “[I]t is the role of the trial judge to instruct the jury on the law.”

Syllabus Point 5, in part, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (W. Va. 2004). Contrary to the Petitioner’s brief, the Respondents clearly identified and set forth the statutory duties owed and breached by the Petitioner.

The Petitioner is also incorrect that the Plaintiffs needed expert testimony to prove the liability of the Defendant. Defendant’s argument that the plaintiff’s case must be dismissed for failing to designate a liability expert is unsupported by citation to any opinion from the West Virginia Supreme Court mandating that expert witness testimony is required for case like the one at bar. The defendant has failed to cite a single case holding that expert testimony is required on the issue of whether or not a defendant keeps their property in reasonably safe condition for guests. The issues involved are not of such a complex or technical nature that it is beyond the ordinary and common knowledge of the average lay juror. Syl. Pt. 3, *Anderson v. Chrysler Corp.*, 184 W.Va. 641, 645-46, 403 S.E.2d 189, 193-94 (1991). The average lay juror has experience and understanding of parks and fences. The jurors in the case at bar did not need expert testimony to understand that a fence rail should not break into several tiny pieces when a minimal amount of pressure is applied. In fact, expert witness testimony is not a mandatory requirement in all cases involving medical negligence. Syl. Pts. 6 and 9, *McGraw v. St. Joseph's Hosp.*, 200 W.Va. 114, 488 S.E.2d 389 (1997). In the case of *Arnazzi v. Quad/Graphics, Inc.*, regarding the necessity of expert witness testimony in a deliberate intent case, the West Virginia Supreme Court stated:

At oral argument, the appellees suggested that the appellant was at the least

required to have an expert give an opinion that the lack of required forklift safety training was a proximate cause of the accident. The appellees do not provide any authority for this proposition. We are not inclined to adopt a rule that expert testimony is necessary as a matter of law in all cases to prove that a lack of required safety training proximately caused or contributed to an accident or injury. In such cases, the finder of fact must look at the nature of the training and the accident or injury and determine if there is a proximately causal connection. Cf. *Lewis v. State*, 73 S.W.3d 88, 93 (Tenn.App.2001) (inadequate training was a proximate cause of workplace injury); cf. also *Wald-Tinkle v. Pinok*, --- S.W.3d ---- (Tex.App.2004), No. 01-02-01100-CV, Dec. 23, 2004, Slip Op. at 7, 2004 WL 2966293. An expert could certainly assist the finder of fact in this determination. Industrial safety training is an advanced discipline, and experts can show how accidents are reduced and averted by formal, mandatory training programs. Likewise, experts might explain how a safety training program would not have made any difference in a given case. But in the instant case, neither the appellant nor the appellees proffered such an expert; nor were they required to do so.

*Arnazzi v. Quad/Graphics, Inc.*, 218 W.Va. 36, 40 n.5, 621 S.E.2d 705, 709 n.5 (2005). “We hasten to point out that the circuit court has discretion to determine at trial, on a proper motion at the close of the evidence by both the plaintiffs and defendants, whether lack of expert testimony by the plaintiffs necessitates a directed verdict. We stated in *Tanner* that “[a] determination by the

trial court as to whether a plaintiff has presented sufficient evidence absent expert testimony such that the jury from its own experience can evaluate the claim, its causal connection to the defendant's conduct and the damages flowing therefrom will not be disturbed unless it is an abuse of discretion.' *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 654, 461 S.E.2d 149, 160 (1995).” *Sheely v. Pinion*, 200 W.Va. 472, 479 n. 10, 490 S.E.2d 291, 298 n.10 (1997). It was clearly not an abuse of discretion for the trial court to deny the Defendant’s motion for directed verdict and submit the case to jury. Whether or not the public grounds and fence of a park were maintained and kept in good repair is not an area that requires the testimony of the expert. Almost every juror has been to a park or had the occasion to lean against a fence and for these reasons the Petitioner’s argument fails.

The Petitioner incorrectly states that there was no evidence or testimony to support a finding of liability against the Defendant. Plaintiff Joseph Dattoli testified that he went to lean against the second fence post because he thought the fence post was the strongest point and his butt was on the post when he put his hand on the top rail which almost instantly broke off causing him to fall down the hill and be injured to his left shoulder. *See Appendix: Trial Transcript, Bates 1042-1044.* Prior to his fall, Plaintiff Dattoli glanced at the fence to see if it looked solid and observed that everything was still there and attached. *Appendix: Trial Transcript, Bates 1044, lines 19-24.* There is no evidence that Plaintiff Dattoli was sitting or attempting to sit on the fence. *Appendix: Trial Transcript, Bates 1043, lines 9-10.* There is also no evidence or testimony that Plaintiff Dattoli pushed the board/rail from the hole before the fall. *Appendix: Trial Transcript, Bates 1092, lines 14-18.* In fact, it is clear from the exhibits and pictures that the rail broke into several small pieces causing Plaintiff Dattoli to fall. In addition

to Plaintiff Dattoli's testimony, his ex-daughter-in-law, Rachel Higgins, testified that Plaintiff Dattoli was standing in the grassy area near the fence and not in the parking lot. *Appendix: Trial Transcript, Bates 994, lines 11-13 and Bates 995, lines 4-7.* Ms. Higgins further testified that Plaintiff Dattoli was standing near the fence and when he went to put his arm back to touch the fence he instantly fell. *Appendix: Bates 995, lines 13-15.* Ms. Higgins went on to testify that Plaintiff Dattoli was doing nothing unusual or out of the ordinary, and the fence rail instantly gave way and caused Plaintiff Dattoli to fall hard. *Appendix: Trial Transcript, Bates 996.* Ms. Higgins also observed that it was the top rail that gave way and broke. *Appendix: Bates 1001, lines 1-2.* It is clear from the testimony of Plaintiff Dattoli and Ms. Higgins that Plaintiff Dattoli was doing nothing out of the ordinary and did nothing that could be conceived as comparative negligent. That Plaintiff Dattoli was found to be zero percent (0%) comparatively at fault by the jury confirms the issue of liability was decided correctly.

The Defendant's own corporate designee, John Hargleroad, the Director of Operations for the Park since 1990, testimony provides more than enough information for a finding of liability against the Defendant. *See appendix: Trial Transcript, Bates Stamp 1127.* Mr. Hargleroad testified that the fence in question was not there in the 70's but was there in the 90's so it was installed at some point therein. *Id.* at 1129. Mr. Hargleroad also testified that the Park produced no records or documents in response to the Plaintiffs request asking for repair or maintenance records. *Id.* at 1147. Additionally, in testifying regarding Defense Exhibit 17 (several pieces of the broken subject fence), Mr. Hargleroad testified it was his understanding that it was the piece that disengaged causing Plaintiff Joseph Dattoli to fall. *Id.* at 1160. Mr. Hargleroad further testified that he understood that wood has a life expectancy. *Id.* at 1161.

Further, Mr. Hargleroad testified that the Park was in a better position to make sure the fence was in a state of good repair than a guest of the Park. *Id.* at 1163-1164. All of this testimony from the Defense's only witness, called by the Plaintiffs in their case in chief, to testify is more than sufficient to sustain the finding of liability against the Defendant. The Defense called no witness in its case in chief. It is clearly shown that the Park was in a position to keep the fence in good repair and failed to do so. The Defendant was unable to produce a single document or testimony relating to the installation, repair or maintenance of the fence during its lifetime even though the Defendant knew that the wood has a life expectancy. The testimony, taken as a whole, makes it clear that the Defendant breached its duty to the Plaintiff by failing to maintain and keep the fence and the rest of public grounds in a state of repair.

**II. The Circuit Court did not err or abuse its discretion in granting the Plaintiffs a new trial on the issue of damages only.**

The Circuit Court was correct in granting the Plaintiffs a new trial on the issue of damages only. Contrary to Petitioner's argument, this is not a "Type 2" case under a *Freshwater v. Booth* analysis. 160 W.Va. 156, 160; 233 S.E.2d 312, 315 (1977). As explained in the *Freshwater* case a "Type 2" is one in which, "an appellate court cannot infer from the jury verdict alone whether the jury were confused about the proper measure of damages or whether they were confused about the proper rules for determining liability, or both. *Id.* at 160; 315. This case clearly does not fit under the "Type 2" analysis as the jury demonstrated there was no confusion about liability by assigning one hundred percent (100%) fault to the Defendant. *See Appendix: Verdict Form, Bates 758-760.* The jury found that Mr. Dattoli was not in any way

negligent by answering “No” to Question 2 on the Verdict Form. The jury assigned one hundred percent fault to the Defendant even though the Defense’s entire trial argument and closing argument was based upon the comparative negligence of the Plaintiff Joseph Dattoli. The jury was instructed on the issue of comparative negligence and had separate lines for assignment of fault on the Verdict Form. That the jury assigned one hundred percent fault to the Defendant shows that the issue of liability was conclusively proven and they were confused on the issue of damages.

If the case at bar fits into any of the *Freshwater* type cases, it should be considered a “Type 4” case. *Id.* at 164; 317. The “Type 4” is one in which, “while the plaintiff would not be entitled to a directed verdict on the matter of liability, the issue of liability has been so conclusively proven that an appellate court may infer that the jury’s confusion was with regard to the measure of damages and not to liability.” *Id.* In this instance a new trial on damages alone is justified as, “it would be unfair to put the plaintiff to the expense and aggravation of proving liability once again when he has been denied a proper and just verdict by the caprice and incompetence of a particular jury.” *Id.* “Where liability has been proven once, and where the jury has found liability but not found adequate damages, the plaintiff is placed at a severe disadvantage and the defendant, if the case is remanded for a new trial on all issues enjoys a windfall.” *Id.* Although it is difficult to argue that an award of over \$50,000 for past medical bills and lost wages is inadequate, the plaintiffs should have least received additional awards for past pain and suffering, past loss of enjoyment of life, and loss of consortium. There was uncontroverted testimony at trial on these issues and the jury awarded zero (0) dollars for these line items. It is clear from the record and Verdict Form that jury was confused only on the issue

of damages as they found one hundred percent (100%) liability on the part of the defendant but failed to make an award on the line items of damage where there was unrefuted testimony.

“Although this Court has stated that in an appeal from an allegedly inadequate award ‘the evidence concerning damages is to be viewed most strongly in favor of the defendant,’ *Kaiser v. Henlsey*, 173 W.Va 548; 318 S.E.2d 598 (1983), we have ‘consistently held that where there is uncontroverted evidence of damages and liability is proven, a verdict not reflecting them is inadequate.’ *Payne v. Gundy*, 196 W.Va. 82, 85; 468 S.E.2d 335, 338 (1996) quoting *Raines v. Thomas*, 175 W.Va. 11, 14; 330 S.E.2d 334, 336 (1985). *See also* Syl. Pt. 2, *Godfrey v. Godfrey*, 193 W.Va. 407, 459 S.E.2d 488 (1995); Syl Pt. 1, *Bennet v. Angus*, 192 W.Va. 1, 449 S.E.2d 62 (1994); Syl. Pt. 1, *Linville v. Moss*, 189 W.Va. 570, 433 S.E.2d 281 (1993); Syl. Pt. 2, *Fullmer v. Swift Energy Co. Inc.*, 185 W.Va 45, 404 S.E.2d 534 (1991). In this case, it is uncontroverted that Plaintiff Joseph Dattoli suffered a massive full thickness rotator cuff tear that required a surgery to repair and a substantial amount of physical therapy during the recovery process. *See Appendix: Trial Transcript at Bates Stamp 1047-1051; see also* evidentiary deposition of Dr. Patrick Demeo, Bates 911-951. It also not contested that Plaintiff Dattoli suffered from chronic low back pain and arthritis in his knees. However, these pre-existing conditions are easily distinguishable from the pain and suffering associated with the shoulder injury at issue in this case. Additionally, it is unrefuted that Plaintiff Kerry Dattoli suffered a loss consortium as Plaintiff Joseph Dattoli had to sleep in a recliner due to his shoulder injury and associated pain and he was also unable to help with the usual household chores. The Defense called no lay or medical witnesses in its case in chief to refute any of the Plaintiffs’ witnesses’ testimony, and in fact, the only Defense witness to testify was the Defendant’s corporate designee called in the

Plaintiffs' case in chief. Again, for the reasons stated above, the Circuit Court was correct in granting a new trial on the issue of damages only.

“Rule 59(a), R.C.P., provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages.” *Richmond v. Campbell*, 148 W.Va. 595, 136 S.E.2d 877, Syl. Pt. 4 (1964); *see also Hall v. Groves*, 151 W.Va. 449, 153 S.E.2d 165 (1967); *England v. Shuffleberger*, 152 W.Va. 662, 166 S.E.2d 126 (1969); *Biddle v. Haddix*, 154 W.Va. 748, 179 S.E.2d 215 (1971); *Shields v. Church Bros.*, 156 W.Va. 312, 193 S.E.2d 151 (1972); *King v. Bittinger*, 160 W.Va. 129, 231 S.E.2d 239 (1976); *Simmons v. City of Bluefield*, 159 W.Va. 451, 225 S.E.2d 202 (1976); *O’Neil v. City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977); *Gebhardt v. Smith*, 187 W.Va. 515, 420 S.E. 2d 275 (1992). It has also been stated that, “as a general proposition, ‘ we review a circuit court’s rulings a motion for new trial under an abuse of discretion standard’.” *Payne v. Gundy*, 196 W.Va. 82, 85; 468 S.E.2d 335, 338 (1996), *quoting Tennant v. Marion Helath Care Foundation, Inc.*, 194 W.Va. 97 (1995), *see also Coleman v. Sopher*, 194 W.Va. 90, 459 S.E.2d 367, 373 (1995); Syl. Pt. 2 *Maynard v. Adkins*, 193 W.Va. 456, 457 S.E.2d 133 (1995); Syl. Pt. 3 *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994). “A trial judge’s decision to award a new trial is not subject to review unless the trial judge abuses his or her discretion.” Syl. Pt. 2, *State ex rel. Valley Radiology, Inc. v. Gaughan*, 220 W.Va. 73, 640 S.E.2d 136 (2006), *quoting in part* Syl. Pt. 3, *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994). In the *Gaughan* wrongful death case, the jury returned a verdict for the total amount of the stipulated

medical bills and funeral but returned nothing for sorrow and mental anguish or lost income despite there being separate line items on the verdict form. *Id.* at 75, 138. The trial judge later granted plaintiffs' motion for new trial on the issue of damages only. *Id.* at 76, 139. On appeal, this Court found that the trial judge did not abuse his discretion on awarding a new trial on the sole issue of damages. *Id.* at 78, 141. We believe the case at bar is comparable in that the jury awarded medical bills and lost wages nothing for the other line items on the Verdict Form. We maintain that Judge Wilson did not abuse his discretion in awarding the Plaintiffs a new trial on the issue of damages as the issue of liability was decided one hundred percent (100%) against the Defendant. The Circuit Court's Order granting the plaintiffs a new trial on the issue of damages should be upheld or alternatively, the verdict should be upheld as is, as a new trial on all issues is unwarranted.

**III. The Petitioner is not entitled to a set-off of all insurance benefits received by the Respondent.**

The Petitioner's third assignment of error is not ripe for consideration as the Circuit Court has not ruled on either the Petitioner's Motion for Partial Summary Judgment in Regard to the "Set-Off" of All Insurance Proceeds Received from Plaintiff's First Party Insurance Providers or Petitioner's Motion for "Set Off" of All Insurance Benefits Received from Plaintiff's First-Party Insurance. Syl. Pt. 3, *Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (W. Va. 1995); *Stephens v. West Virginia College of Graduate Studies*, 203 W. Va. 81, 88-89, 506 S.E.2d 336, 343-344 (W. Va. 1998).

Also, the Respondents maintain that the West Virginia statute, W.Va. Code § 29-12A-

13(c), dealing with subrogation is pre-empted as it serves to negate or modify subrogation, reimbursement, or set-off of insurance benefits that are already governed by federal law. This pre-emption exists regardless of whether the subrogation beneficiary is a private entity, or the Federal Government itself such is the case with the Federal Employee Retirement Income Security Act (ERISA). Respondent Joseph Dattoli's medical insurance was provided through his employment.

In *PPG Industries Pension Plan A v. Crews*, the Fourth Circuit held that “[t]he West Virginia Workers' Compensation Act relates to a method of benefit integration that is protected by federal law. To the extent that the West Virginia law speaks to PPG's offset pursuant to the terms of the Plan, it is clearly preempted by ERISA.” *PPG Industries Pension Plan A v. Crews*, 902 F.2d 1148, 1150 (4<sup>th</sup> Cir. W.Va. 1990). “ERISA was ‘intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.’” *Id.* quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985). “We hold that whatever the law's correct construction, it is preempted by ERISA to the extent that it ‘relates to’ integration of pension benefits with awards of workers' compensation.” *Id.* “ERISA ‘supersedes any and all State laws insofar as they . . . relate to any employee benefit plan’ within its scope. 29 U.S.C. § 1144(a) (emphasis added)”. *Id.* “The Supreme Court has been emphatic on ERISA's preemptive force.” *Id.* “A law ‘relates to’ an employee benefit plan . . . if it has a connection with or reference to such a plan.” *Id.* quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983). “ERISA preemption, moreover, “is not limited to ‘state laws specifically designed to affect employee benefit plans,’” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48, 95 L. Ed. 2d 39, 107

S. Ct. 1549 (1987) (quoting *Shaw*, 463 U.S. at 98), for "even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." *Id.* quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525, 68 L. Ed. 2d 402, 101 S. Ct. 1895 (1981).

In *Fmc Corp. v. Holliday*, the United States Supreme Court held that ERISA pre-empted a Pennsylvania law precluding employee welfare benefit plans from exercising subrogation rights on a claimant's tort recovery. *Fmc Corp. v. Holliday*, 498 U.S. 52, 65, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990).

Therefore, the set-off for first-party insurance benefits sought by the Petitioner under W.Va. Code § 29-12A-13(c) is preempted by ERISA.

Finally, the Petitioner is not entitled to the set-off requested as the Petitioner is improperly attempting to reduce the damages awarded above and beyond the amount actually paid by Respondent Joseph Dattoli's health insurer, Carelink, and Petitioner is attempting to claim a set-off for wages received directly from Respondent Joseph Dattoli's employer. The Respondents maintain that the plain language of W.Va. Code § 29-12A-13(c) doesn't allow the relief requested by the Petitioner. The Petitioner is improperly attempting to take credit for adjustments by medical providers instead of the amount of actual insurance proceeds provided by Respondent Joseph Dattoli's health insurer. These are not the type of insurance proceeds or subrogable interests governed by W.Va. Code § 29-12A-13(c) or *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1987).

If this Court finds that W.Va. Code § 29-12A-13(c) is not preempted by ERISA, then the Petitioner is only entitled to a set-off for the actual subrogation lien the first-party insurers could have asserted against the Respondent, which is \$9,637.95 in health insurance payments and

\$1,216.67 in disability payments from Combined Life Insurance Policy. As the Petitioner's brief has not provided any basis for the requested offset, the Respondents respectfully request leave to further address this issue raised in any reply brief or supplemental brief filed by the Petitioner.

### CONCLUSION

For the reasons set forth herein, the trial court's decision to deny Petitioner's Motion for Directed Verdict and grant Respondents' Motion for a New Trial on Damages were appropriate and within the trial court's discretion. The Respondents pray that this Court affirm the trial court's rulings. As for the Petitioner's third assignment of error, the Petitioner's requested relief should be denied as the issue is (a) not ripe for consideration, (b) the Petitioner is not entitled to the set-off requested as the Petitioner has requested a set-off above and beyond that allowed by W.Va. Code § 29-12A-13(c) and *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1987), and (c) W.Va. Code § 29-12A-13(c) is preempted by ERISA.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on May 21, 2015, a true and correct copy of the foregoing **RESPONDENTS' BRIEF** was hand delivered to counsel of record for the Petitioner as follows

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